



*Serving the Iowa Legislature*

# IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

August 15, 2013

2013 Interim No. 5

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## August 2013

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4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

## September 2013

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
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29	30					

Tuesday, September 10, 2013

**Administrative Rules Review Committee**

9:30 a.m., Committee Room 116, Statehouse

*Iowa Legislative Interim Calendar and Briefing* is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

# AGENDAS

## INFORMATION REGARDING SCHEDULED MEETINGS

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### **Administrative Rules Review Committee**

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

Location: Room 116, Statehouse

Date & Time: Tuesday, September 10, 2013, 9:30 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53>

### ADMINISTRATIVE RULES REVIEW COMMITTEE

August 6, 2013

**Chairperson:** Representative Dawn Pettengill

**Vice Chairperson:** Senator Wally Horn

#### **ENVIRONMENTAL PROTECTION COMMISSION, *Leak Detection at Unstaffed Facilities*, ARC 0836C, 07/24/13 IAB, NOTICE.**

**Background.** Leak detection in petroleum underground storage tanks (UST) has always been a major concern, especially when the facility has no on-site personnel. These systems must have either a leak detector capable of shutting off the submersible pump or a device that immediately alerts the operator when a leak is detected. Out of 2,700 facilities, 150 to 200 are unstaffed.

**Commentary.** This proposal allows existing in-line leak detection methods to be used when the UST facility is unattended, with additional requirements to ensure that detected releases are addressed. The proposal allows for immediate shutdown of the submersible pump when a release is detected. It also allows for flow restriction or the triggering of an audible or visual alarm when a leak is detected and either notification to or a daily visit by the facility's operator. Notification can occur either by immediate electronic communication of a release from the leak detection monitor or by signage at the site with a telephone number directing the customer to call the operator or designee when a potential release is indicated. Costs for these improvements range from \$5,000 to \$15,000; much of that cost is incurred digging through concrete.

**Action.** No action taken.

#### **IOWA FINANCE AUTHORITY, *Military Service Member Home Ownership Assistance Program*, ARC 0827C, 07/10/13 IAB, ADOPTED.**

**Background.** The Military Service Member Home Ownership Assistance Program provides veterans with a \$5,000 grant that may be used toward entry cost assistance, such as down payment and closing cost assistance on a qualifying home purchase.

**Commentary.** The new rules require the applicant to utilize one of the authority's home buyer mortgage programs if the applicant qualifies; the revision eliminates a current provision allowing alternative financing if it is of lower cost. Iowa Finance Authority (IFA) representatives noted that as a practical matter, an IFA program would provide better terms; the representative stated that lower cost means more than just the interest rate, and includes all the other terms and conditions of the loan. Committee members questioned this conclusion; members felt that the applicant should be free to choose whatever financing provided the best cost.

**Action.** A 70-day delay was imposed, additional review is expected in September.

#### **HUMAN SERVICES DEPARTMENT, *Reimbursement Method for Case Management Services*, ARC 0839C, 07/24/13 IAB, NOTICE, also filed EMERGENCY, ARC 0840C.**

**Background.** These amendments change the reimbursement method for case management services under the Medicaid state plan, habilitation, home- and community-based services for individuals with a brain injury and for the elderly. Case management currently uses a cost-based reimbursement methodology. Due to the requirement in legislation for cost containment strategies, the department is limiting the administrative costs to 23 percent of direct service costs for FY 2013-2014. During FY 2013-2014, the department will work with stakeholders to determine the rate methodology for FY 2014-2015.

**Commentary.** The department is continuing to work with stakeholders on this rulemaking. These new proposals for FY 2013-2014 and FY 2014-2015 are an effort to respond to concerns raised about the department's prior draft. Public comment was received from the Iowa State Association of Counties and Polk County Health Services expressing concern about the effect of the new reimbursement method on their ability to continue to provide adequate services. They cited negative impacts from changing billable units to 15-minute increments in recent years and from shifting more costs into the indirect/administrative cost category.

**Action.** No action taken.

#### **MEDICINE BOARD, *Standards of Practice—Physicians Who Prescribe or Administer Abortion-inducing Drugs*, ARC 0891C, 07/24/13 IAB, NOTICE.**

**Background.** This proposed amendment establishes the standards of practice for physicians who prescribe or administer abortion-inducing drugs. The amendment provides that a physician shall not induce an abortion by providing an abortion-inducing drug unless the physician has first performed a physical examination of the woman to determine,

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

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*(Administrative Rules Review Committee continued from Page 3)*

and document in the woman's medical record, the gestational age and intrauterine location of the pregnancy. A physician would be required to be physically present with a woman when providing an abortion-inducing drug to the woman. A physician who provides an abortion-inducing drug to a woman would be required to schedule a follow-up appointment with the woman at the same facility where the abortion-inducing drug was provided. The board will hold a public hearing on this rulemaking on August 28 at the Wallace Building auditorium at 1 p.m.

**Commentary.** Stakeholders in opposition to this rulemaking cited low levels of complication and high satisfaction rates for this procedure, and noted that no complaints have been made by patients who have received it. They discussed the history of telemedicine in Iowa, both for abortion and for various other medical uses, and noted that the board has not chosen to prohibit other forms of telemedicine. They cited an investigation of this procedure conducted by the board in 2010, which was closed without incident. They also suggested that arguments against the procedure made by supporters of this rulemaking were not evidence-based. In response to a request by a committee member, a physician who conducts medical abortions gave a detailed description of the procedure and stated that the only difference in care between an in-person medical abortion and a telemedicine medical abortion is whether a doctor physically hands a woman the pill. Stakeholders also questioned whether the board had pursued this rulemaking with inappropriate haste, and noted that the Legislature has repeatedly rejected legislation prohibiting telemedicine abortion in the past.

Stakeholders in support of the rulemaking cited potentially severe side effects from the procedure, and described receiving phone calls from women suffering from such side effects about which they were not adequately informed, and also required referral for assistance. Stakeholders expressed concern that nonmedical personnel might be involved in the procedure, resulting in women suffering complications without medical personnel available to assist them. Additional stakeholders questioned the claims that medical abortions cause few complications, and stated that other studies have shown the opposite.

Committee members asked if the board would pursue emergency rulemaking for this proposal, and a representative of the Governor's Office said it would not be authorized for this proposal. A motion to suspend the Notice of Intended Action for this proposal did not carry. A board representative urged interested parties to attend the board's public hearing on this proposal on August 28.

**Action.** No action taken.

**Next Meeting.** The next regular committee meeting will be held in Room 116, on Tuesday, September 10, 2013, beginning at 9:30 a.m.

*Secretary ex officio:* Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

*LSA Staff:* Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53>

## LEGAL UPDATES

**Purpose.** A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

## LEGAL UPDATE—GENDER DISCRIMINATION IN EMPLOYMENT—REHEARING

Filed by the Iowa Supreme Court

July 12, 2013

**Nelson v. Knight, \_\_\_N.W.2d\_\_\_ (Iowa 2013) No. 11–1857**

[http://www.iowacourts.gov/Supreme\\_Court/Recent\\_Opinions/20130712/11-1857.pdf](http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20130712/11-1857.pdf)

**Rehearing.** The Iowa Supreme Court filed a unanimous decision on December 21, 2012, affirming the district court's ruling that Dr. James Knight, the defendant in the case, was entitled to summary judgment. The Court found that the plaintiff, Ms. Melissa Nelson's employment was terminated not because of her gender, but because of Mrs. Knight's

# BRIEFINGS

## INFORMATION REGARDING RECENT ACTIVITIES

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### *(Legal Update—Gender Discrimination in Employment—Rehearing continued from Page 4)*

demand that she be fired, which was based upon Mrs. Knight's perception that the relationship between Dr. Knight and Ms. Nelson was a threat to their marriage. Ms. Nelson petitioned the Court for a rehearing. The petition for rehearing was granted.

**Background.** The plaintiff, Ms. Nelson, worked for the defendant, Dr. Knight, for over 10 years as a dental assistant in his dental office. During the last year and a half of that period, Dr. Knight began to complain that Ms. Nelson's clothing was too revealing and made other remarks to her which were sexual in nature. Ms. Nelson and Dr. Knight also began texting each other outside of work. Some of Dr. Knight's texts to Ms. Nelson were also sexual in nature. Dr. Knight's wife became aware of the texting and demanded that he terminate Ms. Nelson's employment because she felt Ms. Nelson's behavior was a threat to their marriage. The Knights consulted their pastor, who agreed with Mrs. Knight's position. Dr. Knight then terminated Ms. Nelson's employment, telling her that their relationship had become a detriment to his family and that the termination was in their mutual best interests. Dr. Knight later told Ms. Nelson's husband that she had not done anything wrong or inappropriate and that she was the best dental assistant he ever had. Dr. Knight explained that he was concerned he was growing too attached to her and might try to have an affair with her, although nothing had occurred as of yet. Ms. Nelson filed a complaint with the Iowa Civil Rights Commission and then filed suit against Dr. Knight alleging gender discrimination in the termination of her employment. She did not allege sexual harassment. Dr. Knight filed a motion for summary judgment which the district court granted, stating, "Ms. Nelson was fired not because of her gender but because she was [a] threat to the marriage of Dr. Knight." Ms. Nelson appealed.

**Issue.** Whether an employer who terminates the employment of an employee based on the concerns of the employer's spouse regarding the relationship between the employer and the employee commits unlawful gender discrimination under the Iowa Civil Rights Act.

**Arguments and Holding.** The Court's unanimous decision affirmed the district court's ruling that Dr. Knight was entitled to summary judgment. The Court found that Ms. Nelson's employment was terminated not because of her gender, but because of Mrs. Knight's demand that she be fired, which was based upon Mrs. Knight's perception that the relationship between Dr. Knight and Ms. Nelson was a threat to their marriage.

Under the Iowa Civil Rights Act, it is unlawful to discharge or otherwise discriminate against an employee because of the employee's gender. Dr. Knight argued that Ms. Nelson's employment was not terminated because of her gender, but because of the nature of their relationship and the perceived threat to his marriage. Dr. Knight noted that all of his employees are women. Ms. Nelson argued that the termination of her employment constituted gender discrimination because the relationship and the perceived threat would not have occurred but for her gender.

The Court stated that cases interpreting federal civil rights law guide the Court's interpretation of the Iowa Civil Rights Act. The Court then discussed a series of federal cases finding that favoritism in employment based upon a consensual sexual relationship between an employer and an employee did not constitute gender discrimination, even though the sexual relationship would not have occurred but for the employee's gender. The rationale in these cases was that it was the employee's sexual conduct, not the employee's gender, which resulted in an adverse employment action. The Court reasoned that the result should be the same whether the sexual relationship results in either favoritism or unfavorable treatment of the employee. The Court analogized that line of cases to the facts in the case at hand. If a termination based on a sexual relationship would not, in and of itself, constitute gender discrimination, nor should the relationship between Ms. Nelson and Dr. Knight. The Court acknowledged the key distinction that Ms. Nelson had not engaged in any sexual conduct with Dr. Knight. The Court noted, however, that alleged improper conduct by an employer is the issue in employment discrimination cases, not improper conduct by an employee. Therefore, Ms. Nelson's choice not to reciprocate Dr. Knight's attention would not determine the outcome of the case. The Court also cited a case similar to this one, in which a female employee's employment was terminated for causing jealousy within her employer's family, for which she was blameless. The cause of the termination in that case was found to be the employer's desire to resolve the familial conflict, not the employee's gender.

The Court rejected an assertion by Ms. Nelson that any termination of employment because of an employer's physical interest in an employee is, by definition, gender discrimination. The Court stated this would mean that any termination of employment resulting from a consensual relationship would amount to gender discrimination, because the relationship would not have happened but for the employee's gender. The Court noted that under federal precedent, the consensual relationship is considered to be the determining factor in such cases, not the employee's gender. The Court then drew a distinction between what it called an "isolated employment decision based on personal relations" and gender discrimination. The Court stated that a decision "driven entirely by individual feelings and emotions regarding a

*(Legal Update—Gender Discrimination in Employment—Rehearing continued from Page 5)*

specific person” is not a decision based on the person’s gender. The Court acknowledged that Dr. Knight’s treatment of Ms. Nelson was unfair, but stated that the Iowa Civil Rights Act does not prohibit employer conduct that is merely unfair, if it is not discriminatory. The Court stated when Dr. Knight replaced Ms. Nelson with another woman, he did not violate the goal of the Iowa Civil Rights Act, which is to ensure equal treatment of employees regardless of their gender, not to ensure that employees are treated fairly.

The Court also acknowledged a lack of other factors which might have resulted in a different outcome. Ms. Nelson did not show that Dr. Knight had treated any other employee the way he treated her or that he had terminated her employment for failing to conform to gender stereotypes. The Court noted “that Dr. Knight made a number of inappropriate comments toward Nelson that are of a type often seen in sexual harassment cases,” and repeatedly emphasized that Ms. Nelson had chosen not to pursue a claim against Dr. Knight for sexual harassment. The Court also reasoned that Dr. Knight’s termination of Ms. Nelson’s employment out of concern that he might commit sexual harassment in the future is not the same as actually committing sexual harassment.

**Concurrence.** On rehearing, Chief Justice Cady, joined by Justices Wiggins and Hecht, filed an opinion concurring specially with the majority opinion, in order to “further explain the basis and rationale for the decision.” He stated that the language of the Iowa Civil Rights Act prohibiting gender discrimination in the workplace “could not be more general,” and that “the task of determining a more precise meaning of sex discrimination has largely been left for the courts.” He admitted that such a meaning can be “elusive” in light of Iowa’s longstanding employment-at-will doctrine, “which permits employers to terminate employees for reasons personal to them, so long as the will of the employer is not discriminatory or otherwise against public policy.” He also noted that court decisions on this subject “at times, created controversy and divisiveness, especially when decisions by courts are not fully explained or when court decisions are not fairly read and interpreted or accepted.”

He discussed how courts have generally interpreted federal civil rights law to mean that “differential treatment based on an employee’s status as a woman constitutes sex discrimination, while differential treatment on account of conduct resulting from the sexual affiliations of an employee does not form the basis for a sex-discrimination claim.” The result of this precedent is “the general legal principle that an adverse employment consequence experienced by an employee because of a voluntary, romantic relationship does not form the basis of a sex-discrimination suit,” because the adverse employment action resulted from the relationship, not the employee’s gender. He explained that “the law against workplace discrimination only seeks to protect a woman from discrimination based on her status as a woman in the workplace, not on her consensual sexual relationships or personal affiliations with her employer.” This principle applies in Iowa as well, given the longstanding presumption that federal civil rights law and the Iowa Civil Rights Act have “similar scope and meaning.” He cited case law specifically providing that this rule “is not confined to relationships involving sexual activity.” He conceded that an employer terminating the employment of an employee based on a personal relationship with the employee could be “unfair,” but explained that under the employment-at-will doctrine, actions by employers that are merely unfair are not prohibited.

He then reviewed the facts of the case in light of these principles. He described in detail how much closer Dr. Knight was with Ms. Nelson than with his other employees, their texting outside of work, and the various sexual comments he made to her. From these facts he found that it is “undisputed” that “Nelson and Dr. Knight developed a consensual personal relationship” that “extended well beyond the workplace.” He acknowledged that they did not have sex, and Ms. Nelson did not reciprocate Dr. Knight’s sexual banter, but still found that they had willingly entered into “a relationship that was much different than would reasonably be expected to exist between employers and employees in the workplace.” He also found no evidence of any discriminatory motive for the termination of Ms. Nelson’s employment, only the relationship, noting that the termination only occurred when Dr. Knight’s wife discovered his text messages to Ms. Nelson, endangering Dr. Knight’s marriage. He concluded that the evidence on the record supported a finding that “Nelson was terminated because of the activities of her consensual personal relationship with [Dr. Knight], not because of her gender,” and thus Dr. Knight was entitled to summary judgment. He emphasized the importance of the undisputedly consensual nature of the relationship, noting that Ms. Nelson did not claim the relationship was “submissive, objectionable, or harassing in any way.” He also emphasized that she did not claim Dr. Knight’s expressed reason for the termination, the threat to his marriage, was “a pretext for an underlying discriminatory intent to terminate her based on her status as a woman.”

He concluded his opinion by stating that he did not find any appellate court or state legislature in the nation that has defined gender discrimination to include adverse employment consequences from a consensual personal relationship, and noted that legislative action can be taken if this ruling does not reflect legislative intent in this area of the law.



# BRIEFINGS

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*(Legal Update—Gender Discrimination in Employment—Rehearing continued from Page 6)*

**Impact and Applicability.** Under the Iowa Civil Rights Act, Iowa Code §216.6(1)(a), it is unlawful to discharge or otherwise discriminate against an employee because of the employee's gender. The Court held that this prohibition does not prevent an employer from terminating the employment of an employee because the employer has a relationship with the employee and the relationship is perceived to threaten the employer's marriage. This case establishes the principle that, under the Iowa Civil Rights Act, adverse employment action taken solely due to an employer's relationship with an employee, even if that relationship would not exist but for the employee's gender, is not considered to be gender discrimination. The Court drew a distinction between adverse employment action motivated by personal feelings toward a particular person and adverse employment action motivated by bias against that person's gender. While the Court agreed that the conduct at issue in this case was unfair, the Court stated that the Iowa Civil Rights Act does not prohibit unfair conduct, only discriminatory conduct.

*LSA Monitor:* Jack Ewing, Legal Services, (515) 281-6048.